Nelson Electrical Contracting Corp. d/b/a Nelcorp *and* International Brotherhood of Electrical Workers, Local Unions 325 and 363, AFL–CIO. Cases 3–CA–19035, 3–CA–19552, and 3–CA–19067

September 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On April 21, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

The judge found, and we agree, that the General Counsel met his initial evidentiary burden of showing that the union affiliations of the applicants were a motivating factor in the Respondent's refusal to consider them for hire and refusal to hire them. In this regard, we rely on the fact that all of the employees who were refused permission to file applications were wearing union insignia at the time that they applied. We also rely on the judge's finding of animus as established by (1) the comments of Foreman Alan Winters,[4] who told an employee that the Respondent did not want to hire "anybody union";[5] (2) the comments of New York Project Manager Andrew Stebner to employee Douglas Nelson advising him not to talk to striking employees, or he would "get in trouble"; (3) the fact that none of the applications in which the applicants show a current, active union involvement was considered; and (4) the Board's prior finding of animus in *Nelcorp,* 316 NLRB 625 (1995).[6]

In adopting the judge's finding of a discriminatory refusal to hire, we also find that the applicants actually applied for jobs and were qualified for jobs for which the Respondent was hiring.[7] Specifically, in September 1994, the Respondent won a contract for work at a site in Liberty, New York. The Union, upon learning this, sent its organizer to the site to request job applications. Foreman Alan Winters advised that he did not need any workers and would not accept applications. Nevertheless, the Respondent hired two unaffiliated journeymen electricians in early September. In late September, despite being told again by Foreman Winters that he did not need any workers, and would not accept applications, the Union submitted six job applications for qualified journey-

[1] On December 15, 1998, the Board granted a joint Motion to Sever and Dismissed the Complaint in Case 3–CA–19788 pursuant to a non-Board settlement agreement reached between the Respondent and IBEW Local 26, AFL–CIO. Accordingly, the complaint allegations regarding the Respondent's Maryland jobsite are no longer before the board, and the order and notice have been modified accordingly.

[2] The judge found that the Respondent was obligated to offer striker David Harageones a position based on his unconditional offer to return to work on January 6, 1995. The judge concluded that the Respondent failed to prove that he had been permanently replaced. The judge further found that the Respondent violated Sec. 8(a)(1) and (3) of the Act when, in mid-February, it unlawfully failed to recall David Harageones. Neither the General Counsel nor the Charging Party argued that there was a violation earlier, i.e., on January 6. Accordingly, we adopt the judge's findings and conclusions.

[3] We agree with the judge that the General Counsel's complaint allegation concerning Anthony Salvatore is not barred by Sec. 10(b). As the judge explained, Salvatore, who applied for work in October 1993, again contacted the Respondent in May 1994. At that time he was told that the Respondent still had his application on file and that he did not need to update it. At no time was he ever expressly denied employment. Impliedly, he was told that his application was still under consideration. His employment application therefore remained active throughout the period of the Respondent's implementation of the unlawful hiring policy. See *Great Lakes Chemical Corp.*, 298 NLRB 615 (1990).

[4] The judge found that Alan Winters was the highest ranking representative of the Respondent at the New York jobsite and that Winters was the person whom the local union organizer, Stephen Rockafellow, dealt with in his efforts to refer union employees. For example, in early September 1994, Winters told Rockafellow that no employees were needed. Again, in late September when Rockafellow arrived at the jobsite with a number of Local 363 members seeking jobs, Winters told Rockafellow that he did not need anyone, had no applications, and that he had been instructed not to receive any applications. In December 1994, Winters accepted a job application and forwarded it to the Respondent. Based on this conduct, it is reasonable to infer that he was an agent of Respondent and would be aware of the Respondent's hiring criteria and would communicate his knowledge of an applicant's union affiliation to his employer. His knowledge of their union affiliations is therefore attributable to the Respondent. *Quality Control Electric*, 323 NLRB 238 (1997). Given Winter's apparent authority to deal with employees applying for jobs at the New York jobsite, we may reasonably attribute to the Respondent Winter's statements concerning the Respondent's hiring policies. *GM Electrics*, 323 NLRB 125, 125–126 (1997). We therefore find it unnecessary to pass on Winter's supervisory status.

Based on the factors set forth by the judge, including, inter alia, that Winters assigned work, made sure that employees were doing their work, laid out work for electricians and directed them where to work, Member Hurtgen, in agreement with the judge, would find that Winters is a supervisor.

[5] This comment is not alleged as unlawful.

[6] In light of this evidence of animus, we find it unnecessary to rely either on the receptionist's remarks in a telephone conversation while applicants John Schlott and Paul Schwatz were in the office or on the timing of the Respondent's use of subcontractor Radec.

[7] In a refusal-to-hire case, the General Counsel has the burden of showing that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; antiunion animus was a motivating factor in the decision not to hire any of the applicants; and the applicants had experience or training relevant to the announced or generally known requirements. *FES,* 331 NLRB No. 20, slip op. at 4 and 7 (2000).

men electricians. Neither the Union nor the applicants received any response. In early October, the Respondent hired four journeymen electricians. None of their applications indicated any union affiliation. In early November, the Respondent advised another union affiliated applicant that it was not accepting job applications. In December, the Respondent placed an advertisement with the New York Department of Labor for an experienced electrician. Between December and February, while in possession of numerous current union applications, the Respondent hired three journeymen electricians with no known union affiliation. In sum, during the period that the Respondent advised the Union it had no openings, it filled at least nine positions in New York for journeymen electricians, while ignoring the applications of the nine qualified union-affiliated journeymen electricians who applied for jobs in New York. We find that this evidence, together with the evidence of animus discussed above, supports the judge's finding of a discriminatory refusal to hire.

We also find that the Respondent did not establish an affirmative defense to the refusal-to-hire allegations under *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), i.e., that the Respondent would have taken the same action on the applications even in the absence of the applicants' union affiliations. In support of its defense, the Respondent contended that, prior to the time the union applicants applied, it had abandoned its policy of receiving applications and chose to rely simply on transfers of its current employees from other projects, former employees, or "positive referrals from other sources." It also contends that it only wished to hire persons proximately located to the jobsites in question. Like the judge, we find no merit to these contentions, in light of the evidence that the Respondent departed from its purported "no applications" hiring policy and advertised for journeymen in New York, hired individuals who were not former employees, and hired without positive referrals. With regard to the proximity-to-jobsite claim, we note that Bill and Ron Gallagher, who had no apparent union affiliation when they applied, were hired to work on the University of Maryland jobsite, even though they were located in New York; and the Respondent was obviously not adhering to any proximity limitation when it transferred employees from a project in one state to a project in another.

We agree with the judge's findings that the Respondent's hiring policy as applied here had a discriminatory impact on union applicants. Because the issue of whether that policy was inherently discriminatory was not litigated, we disavow the judge's findings to the extent that they may be read that way.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nelson Electrical Contracting Corp. d/b/a Nelcorp, Inc., Endwell, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c).

"(c) Refusing to consider for employment and refusing to employ the following:

Richard DiMaio	Harold Doderer
Michael Ferranda	Daniel Harageones
Richard McGinley	Anthony Provenzano
Stephen Rockafellow	Anthony Salvatore"
Herbert Spicer	

2. In paragraph 2(c) change "22 discriminatees" to "9 discriminatees."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in force and effect a hiring policy whereby we will not accept written applications in order to avoid hiring union applicants for employment.

WE WILL NOT fail and refuse to recall David Harageones because of his activities in behalf of a labor organization.

WE WILL NOT refuse to consider for employment or refuse to employ the following employees for employment:

Richard DiMaio	Harold Doderer
Michael Ferranda	Daniel Harageones
Richard McGinley	Anthony Provenzano
Stephen Rockafellow	Anthony Salvatore
Herbert Spicer	

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the individuals set forth above, employment in positions for which they applied or attempted to apply or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them.

WE WILL recall David Harageones to his former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make him whole for any loss of earning and other benefits suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful failure to recall David Harageones, and of the unlawful refusal to consider for employment and to employ the nine discriminatees named above, and notify them in writing that this has been done and will not be used against them in any way.

NELSON ELECTRICAL CONTRACTING CORP.
D/B/A NELCORP

Thomas Sheridan and *Robert Ellison, Esqs*., for the General Counsel.
Jeffrey Tait and *John Domurad, Esqs. (O'Connor, Gacioch & Pope),* of Binghamton, New York, for the Respondent
Ellen Boardman, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., for Local 26
Richard McPherson, of Binghamton, New York, for Local 325.
Stephen Rockafellow, of New City, New York, for Local 363.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. The following charges and amended charges were filed and served in this case. A charge and an amended charge in Case 3–CA–19035 filed on December 12, 1994, and March 27, 1995, respectively by International Brotherhood of Electrical Workers, Local 325, AFL–CIO (Local 325). A charge and an amended charge in Case 3–CA–19067 filed on January 3 and April 20, 1995, respectively, by International Brotherhood of Electrical Workers, Local 363, AFL–CIO (Local 363). A charge and an amended charge in Case 3–CA–19552 filed on August 10, 1995, and February 8, 1996, respectively by International Brotherhood of Electrical Workers, Local 325, AFL–CIO (Local 325). A charge in Case 3–CA–19788 (designated Case 5–CA–25415) filed on June 9, 1995, by International Brotherhood of Electrical Workers, Local 26, AFL–CIO (Local 26) pursuant to which the General Counsel issued an Order Transferring Case 5–CA–25415 from Region 5 to Region 3, and designating it Case 3–CA–19788.[1]

Based on the above charges and amended charges, Region 3 issued an amended consolidated complaint on February 12, 1996, which was further amended on May 16, 1996.[2]

The complaint alleges, essentially, that Nelson Electrical Contracting Corp. d/b/a Nelcorp (Respondent) (a) maintained a hiring policy pursuant to which it will not accept written applications, in order to avoid hiring union applicants for employment; (b) informed an employee that it would not hire union members because they would create problems; (c) refused to hire and/or refused to consider for hire 9 named employees in 1994, and 13 named employees in 1995; and (d) failed to recall or reemploy its employee David Harageones.[3]

It is alleged that Respondent engaged in the discrimination against the employees because those employees had, or Respondent believed that they had joined, supported, or assisted the Unions involved.

Respondent's answer denied the material allegations of the complaint, and asserted certain affirmative defenses. On June 25, 26, and August 19 and 20, 1996, a hearing was held before me in Binghamton, New York.[4]

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel, Local 26, and Respondent, I make the following[5]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its main office and place of business at 2500 Watson Boulevard, Endwell, New York, and doing business at various construction sites in other States, has been engaged in the building and construction industry as an electrical contractor performing mainly industrial and commercial work. During the past year, Respondent has provided services from its Endwell facility valued in excess of $50,000 to other enterprises which are directly engaged in interstate commerce. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent denies knowledge of the labor organization status of Locals 26, 325, and 363. I find, based on the evidence in the record, that the three Unions are organizations in which

[1] Respondent's answer admitted the service of the charges and amended charges, but denied knowledge of the filing of those documents. My review of the original charges and amended charges establishes that all of them have been properly filed.

[2] The original consolidated complaint was issued on April 21, 1995.

[3] During the hearing, I granted General Counsel's motion to dismiss complaint allegations concerning Richard Anderson, Mark Edwards, and Elliott Wagner.

[4] Following the close of the hearing, Local 26 moved to admit certain documents into evidence pursuant to a procedure agreed upon during the hearing. General Counsel, Local 26, and Respondent agree to their admission in evidence, and I have received them as CP Exh. 2. Respondent, however, does not concede their relevance.

[5] General Counsel's unopposed motion to correct the transcript in certain respects is granted.

employees participate, and that they exist, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, and other terms and conditions of employment. In addition, the Board has found that Local 325 is a labor organization. *Nelcorp*, 316 NLRB 625 (1995). I accordingly, find and conclude that Locals 36, 325, and 363 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves the attempts of three local unions to obtain employment from Respondent for the employees they represent. The jobsites are in New York and in Maryland.

Union members, and those seeking to become members sought jobs with nonunion contractors. The Unions hoped to organize the nonunion employers, and in that effort waived the requirement prohibiting union members from working for nonunion companies. Pursuant to that policy, certain union members, and others who sought jobs through the Union, applied for work with Respondent.

General Counsel and the Unions allege that Respondent had a predetermined policy not to consider for hire, and not to hire any applicants referred by the Unions, and to avoid hiring, if possible, any applicants who were union members. Respondent argues that it considered for hire and hired any qualified applicant, pursuant to its hiring policies, and that it did not discriminate against any applicant because of union affiliation.

The complaint alleges that Respondent discriminatorily refused to hire and/or refused to consider for hire certain journeymen electricians, beginning in June 1994. I have not considered in the discussion of those allegations any facts concerning the hire of apprentices, laborers, or nonjourneyman electricians.[6]

III. THE FACTS

A. The New York Jobsite

Union Applicants and Respondent's Hiring

The complaint alleges that on June 12, 1994, Respondent refused to hire and/or refused to consider for hire Daniel Harageones, Anthony Salvatore, and Herbert Spicer, and that on September 28, 1994, Respondent refused to hire and/or refused to consider for hire Richard DiMaio, Harold Doderer, Michael Ferranda, Richard McGinley, Anthony Provenzano, and Stephen Rockafellow.

In October 1993, Anthony Salvatore, a member of Local 325, and a journeyman, visited Respondent's Endwell, New York office. He asked the receptionist if he could complete an application for a job, and he was given one, which he filled out and gave her. The application listed his union apprenticeship training, and his work history, all of which was with union contractors.

Herbert Spicer, a member of Local 325, and a journeyman, testified that on April 3, 1994, he was given an application at Respondent's office, and the following day he submitted it with a cover letter to the Company. The letter identified Spicer as a union member. On April 13 and 18, Spicer called the office and said that he was available for work. He was told that no hiring was being done at that time.

Daniel Harageones, a member of Local 325, and a journeyman, testified that on April 10, he went to Respondent's office, asked for and received an application, and listed thereon his union membership, union apprenticeship program, and his prior employment, most of which were with union contractors. He asked the receptionist if Respondent was hiring. She replied that the Company had just obtained some contracts, would be hiring soon, and that she would have the owner call. Thereafter, Harageones called Respondent's office frequently, each time leaving his name and phone number with the receptionist. She promised to return his call but he was not contacted.

In May 1994, Salvatore called Respondent and asked if he could update his application. The receptionist responded that they were no longer accepting applications. Salvatore explained that he had already completed an application and simply wanted to update it. She said that it would not be necessary, since it would already be on file.

He was not contacted for a job. Thereafter, Salvatore noticed a sign on the door stating that Respondent was not accepting applications.

On about June 2, Daniel Harageones contacted Respondent, and was told that the Company was not accepting applications. He explained that his application was already on file, and that he wanted to update it. The receptionist said that the Company was not taking any applications, but that if his application was on file, a representative would call. Harageones was not contacted thereafter by Respondent.

On September 8, Respondent hired Michael Boyes. His application, filed on September 2, stated that he had received junior and master licenses following 4 years of training with the Local 99, IBEW Electrical School in 1983, and worked for Matco, a well-known union contractor, in 1986. Respondent's president, Mark Nelson, testified that he first became acquainted with Boyes through their church activities, and he then learned that he was an electrician, and through their conversations he was led to believe that Boyes was a union member. Nelson knew that Project Manager Dean Rypkema sought to hire an employee, and Nelson recommended his hire. Boyes last worked in the electrical industry in 1986, and then left to study for the ministry until his employment with Respondent.

On the same date, September 8, Respondent hired Michael McCabe. The events leading up to McCabe's hiring are as follows: McCabe had previously worked with Alan Winters at Respondent's jobsite in Liberty, New York. McCabe phoned Project Manager Andrew Stebner and told him that he spoke to Foreman Alan Winters at the Harris Hospital jobsite, and was currently unemployed and seeking work. Stebner testified that he was then thinking about hiring an electrician. Stebner called Winters, and asked about his qualifications. Winters said that McCabe had been a journeyman for a number of years, and had worked for Ross Electric. Stebner then hired McCabe. At the time that he hired him, his application was not available. Stebner received the application after McCabe's hire. The application prominently indicates that McCabe participated in union activities. It notes that he was a sergeant at arms for IBEW Local 106, and his work experience lists no company names,

[6] Hereafter, the term "journeyman" shall refer to journeyman electrician, a skilled electrician.

but bears the statement "all union experience, inquire Bernie Merick, business agent." [7]

In mid-September 1994, Stephen Rockafellow, the organizer for Local 363 who is also a journeyman, learned that Respondent was performing work at Harris Hospital. He and John Sager, another organizer, visited the site, introduced themselves as union organizers to Job Foreman Alan Winters, and told him that the Union had employees to refer to the job. They asked when he would be hiring. Winters replied that no employees were then needed, and he did not know when there ever would be a need for workers.

On September 28, Rockafellow returned with Local 363 members Richard DiMaio, Harold Doderer, Michael Ferranda, Richard McGinley, Anthony Provenzano, and Sager. Rockafellow told Winters that the men wished to apply for jobs, and requested applications. Winters replied that he did not need anyone, and had no applications. Rockafellow asked if he could leave their names and phone numbers, and Winters refused, saying that he had been instructed not to take any applications.

The Union apparently had blank application forms used by Respondent, and the men went to the union office, where all of them except Sager filled out applications. The applications were sent to Respondent's Endwell office with a cover letter dated September 28, in which Rockafellow identified the applicants as experienced journeymen and union members. The letter and applications were sent by certified and regular mail. The certified letter was returned, marked "refused." The Union received no response to the mailing.

Also in September 1994, Rockafellow sent a letter to Respondent, which stated that Respondent's employee Michael McCabe was a member of the Union who was involved in organizing Respondent's employees. In October, McCabe went on strike and picketed the jobsite. At the same time, union member David Harageones was employed at the site. He had been laid off by Respondent, and the layoff was alleged as an unfair labor practice. In a prior proceeding, the Board dismissed that allegation, but nevertheless Respondent recalled him to work in September. *Nelcorp*, supra. He and McCabe picketed the jobsite in October.

Employee Douglas Nelson, who was employed at the Harris Hospital jobsite, testified that in early October, while Harageones and McCabe picketed the jobsite, he was told by Stebner that he should not speak to Harageones or McCabe because he "could" or "would" get in trouble, and also that he should stay away from them. Nelson further stated that in September, he was instructed by Winters that when he picked up material with Harageones in Respondent's truck, he (Nelson) should not permit Harageones to read any paperwork in the truck. Nelson was also asked by Stebner, how long he believed that Harageones would "last" on the job. Nelson did not reply, and Stebner then said that he did not believe that Harageones would last very long.

Nelson gave uncontradicted testimony that prior to his quitting his employment in late September or early October 1994, he heard Winters tell Stebner that he (Winters) would rather hire Respondent's employees from Binghamton, than hire anyone in Sullivan County, "because of the union," and that they did not want "to hire anybody union."

Harageones testified that on October 3, employee Nelson reported that Stebner advised him not to talk to Harageones because it could cause some problems for him. Harageones told Stebner that he was not happy that Stebner told workers not to talk to him and McCabe. Stebner replied that Harageones is not to discuss anything other than the job.[8] Stebner testified, denying that he said that to Harageones, adding that he told him that he could speak to any employees about anything at any time.

On October 7, Rypkema hired Martin Shaw. His application does not list any union affiliation. Although Nelson testified that he believed that Shaw worked for Respondent previously, the only work experience listed on his application is that he owned two electrical companies during his 10 years of experience.

On October 10, Respondent hired Bruce Streeter. His application does not list any union affiliation.

On October 17, Rypkema hired Gary Sprouse, and assigned him to the Nestle project, which is also located in New York. His application, which does not list any union affiliation, lists as a reference Randy Spafford, a journeyman hired by Respondent in October 1992.

On the same day, Respondent hired B. Clark to work at the Nestle project.

On November 7, Herbert Spicer inquired about a job, and was told that no applications were being accepted. He had submitted an application in April.

Andrew Stebner, Respondent's project manager in New York, testified that, in early December 1994, he was seeking to hire electrician's helpers, not journeymen. He stated that he asked his office manager to contact the New York State Department of Labor employment service to see if any helpers were available for work in the Sullivan County area.

As a result, an advertisement was placed through the employment service's computer job listing service for the month of December. The ad stated that Respondent sought an "experienced commercial electrician" for full-time-work, for a job lasting about 4 weeks at a salary of $12 per hour, but "wage could be higher depending on experience." Applicants were directed to call Stebner for an appointment.

Stebner testified that the ad was placed in error, since an electrician's helper, and not an electrician, was sought. Nevertheless, Stebner conceded that the $12 wage set forth in the ad was that for an electrician, not a helper. In any event, Stebner testified that he hired a helper, Michael Smith. Respondent's records show that Smith, a laborer, was hired on December 12. In contrast, it must be noted that President Nelson testified that one journeyman was hired pursuant to the ad. I cannot credit Stebner's testimony in this regard. The ad is quite specific as to Respondent's needs for a journeyman, and Nelson's testimony confirms that at least one journeyman was sought, and hired

[7] Respondent states that Jason Shaw was hired on September 12 as a journeyman, but Respondent's record of hires, GC 22, and Shaw's application set forth that he was a laborer.

[8] That testimony was offered only as background since Respondent's statements have been remedied by a Board settlement agreement.

pursuant to the ad. Accordingly, I find that Respondent advertised for journeymen in the month of December.

On December 5, David Russo was hired. His application states that he applied for a job as an electrician, and Respondent's list of employees compiled for this hearing states that he was a journeyman, but his application states that he was last employed as an equipment operator, and President Nelson testified that based on that information, he was not a journeyman.

On December 7, Eric Liepens, was hired by Respondent. Stebner hired him on the phone, and knew him as a friend of Winters, who was listed on his application as a reference. Liepens completed his application after he was hired.

On about December 10, John Schlott and Paul Schwatz, members of Local 363, and journeymen, went to Respondent's New York office, and asked for applications. The receptionist directed them to look at the sign, which stated that no applications were being accepted. Schlott then told her that they were from Sullivan County, and they heard that the Company was looking for employees at the Harris Hospital job.

The receptionist then told them to wait, and not leave, as Respondent was seeking employees in Sullivan County. She said she would call her boss, and that they would be interviewed after lunch. The two men went to lunch, and when they returned, the receptionist called "him," and while on the phone looked at them, saying into the phone "uh-huh, maybe, could be, possibly" and then hung up. She then told the two men that "the boss" could not see them today, and that they would be called. She took their names and phone numbers. They did not reveal their union affiliation during the visit, and they were not called by Respondent thereafter. However they called for work the next week and were told that no employees were needed.

Four days later, on December 14, Francis Williams was hired by Respondent, and was assigned to the Olean jobsite. Nelson testified that he lived in Olean, and that Respondent gave preference in hiring for that job to employees who lived in that area, after first considering transfers, and its employees who were receiving unemployment insurance. Williams' application does not list any union affiliation, but bears the notation "Temp 4–6 wks." In fact, Williams worked a total of 5 weeks, and was laid off. Nelson denied knowing who made that notation, and stated that Williams was not hired as a temporary employee.

On December 15, Rockafellow went to the jobsite with his September 28 letter, the six applications, and the advertisement. He told Winters that he understood that Respondent was advertising for electricians. Winters replied that he was not aware of that. Rockafellow answered that the six applicants were still available for work, and he gave the applications to Winters, who said that he would send them to the office. Two weeks later, Winters told Rockafellow that he had sent the applications to Stebner. The Union received no response to the applications.

One month later, Respondent engaged Radec Corp., a nonunion electrical subcontractor, to perform electrical installation work at the Harris Hospital project. Radec worked at the jobsite from mid-January to mid-February 1995. From 2 to 5 Radec electricians worked full time, and occasionally overtime for a total of about 24 days. Stebner and Nelson testified that Respondent used Radec rather than hiring employees at that time, because they were needed for a temporary assignment, lasting 4 to 6 weeks, at a time when the project was about 50-percent complete. Subcontracting made it easier to "manage" Respondent's employees since they would not have to put the new hires on and off Respondent's benefit plans during their short-term employment. Radec had been used by Respondent in the past, on the Carousel Mall project, which took place in about 1990.[9]

As set forth above, William Gallagher, was employed by Respondent in 1990 in Watertown, New York, for about 7 months, until December 1990. His foreman was Stebner. On February 2, 1995, Stebner phoned Gallagher and offered him a job. He had had no contact with Stebner since late 1990.

Stebner testified that he called Gallagher because he recently met an acquaintance who had employed, and then laid off Gallagher, and he believed that Gallagher was available for work. Stebner hired Gallagher on the phone and told him to report to the New York office. When he arrived, he saw the sign, which stated that no applications were being accepted. He asked the receptionist about the sign, and mentioned that Stebner had called him. The receptionist told him that the sign did not apply to him since she knew him and knew that he was a hard worker. He was given an application, which he completed, and an employee handbook. The next Monday he reported to work at the St. Bonaventure job in Olean, New York, and worked there for 1 week.

In mid-February, Gallagher was sent to the Harris Hospital job and worked there for 1.5 months. In mid-March, he was laid off for 2 weeks, and then sent to work in Maryland, as set forth, infra.

On July 10, Respondent hired Joseph Biesecker as the last journeyman to work in New York. He was employed for a total of 7 weeks. He had previously worked, in 1985, for a company owned by Mark Nelson.

B. David Harageones

Harageones has been a member of Local 325 for 10 years. In a prior Board proceeding, *Nelcorp*, supra, it was alleged that Harageones was unlawfully laid off by Respondent because of his union activities. The Board dismissed that allegation, but found that Respondent violated Section 8(a)(1) of the Act by prohibiting him from wearing a hat bearing the union's logo. The administrative law judge's decision was issued on September 21, 1994. Following that decision, notwithstanding that Respondent was under no obligation to recall or reinstate Harageones, Respondent offered him a job at the Harris Hospital site, which he accepted.

Harageones began work on about September 26. As set forth above, on October 3, he was told by employee Douglas Nelson that Stebner advised him not to speak to him or McCabe, and he (Harageones) was told by Stebner that he should only discuss job matters. He immediately confronted Stebner and told him that he was angry that Stebner told Nelson not to talk to him.

[9] Respondent also used union subcontractor John Kelly & Sons for its high voltage work. However it was brought out that the only contractors performing such specialized work are unionized.

One month later, on November 7, Harageones began a strike, which he characterized as an unfair labor practice strike, and so informed Respondent by letter, which was not produced at the hearing. Union organizer McPherson sent a letter to Respondent on December 2, advising it that Harageones is engaged in a "protected lawful dispute" and is protesting the unfair labor practices committed by the Company. President Nelson testified that Harageones went on strike.

On January 6, 1995, Harageones presented a letter to Respondent, which stated that he has decided to end the unfair labor practice strike, and offered to unconditionally return to work under the same terms as he enjoyed before the strike.

On January 10 or 11, Harageones called the office and spoke to Dean Rypkema, Respondent's official, advising him that he was still unemployed and seeking work. Rypkema replied that there is a lot of work, but he did not know whether he would employ him because he quit his employment. Rypkema said that he would have to check with company locations across the country to see if a job was available for him. Harageones inquired about the Harris Hospital job, and Rypkema said that Respondent did not need any more employees there.

A few days later, Harageones phoned Respondent and was told by Purchasing Agent Don Webber that a job was available in Olean, New York, which was for a couple of weeks. That jobsite was about 3.5 to 4 hours away from Harageones' home. Harageones replied that he wanted a position equivalent to the one at Harris Hospital. Webber asked if he was refusing the Olean job. Harageones answered that he was not but he wanted an equivalent position, in which he could be home each night with his family. Webber responded that he could only speak about the Olean job.

On February 6, Harageones phoned Respondent, and told Rypkema that he was still looking for work. Rypkema replied that no work was available, and that the Olean job was filled.

On April 20, Harageones called Respondent and told the secretary that he was available for work, and would accept any position offered. He gave her his name and phone number, and asked her to give that message to Rypkema.

Harageones called Respondent "numerous" times thereafter but never spoke to Rypkema. Each time he left his name and phone number and said that he was seeking employment. In late May 1996, Harageones phoned Stebner and told him that he was still looking for work. Stebner replied that he could not help him.

C. The Maryland Jobsite

Union Applicants and Respondent's Hiring

The complaint alleges that from January through May 1995, Respondent refused to hire and/or refused to consider for hire Tyrone Jackson, Thomas Gough, Kelly Simmons, Thomas Barber, James Camba, John Kirscht, Michael Lee, John Mudd, James Rapczynski, David Rohr, Joseph Ruiz, Monte Brown, and Steve Williams.

In January or February 1994, Charles Graham, the Local 26 organizer, became aware that Respondent had obtained a contract to perform electrical work at the University of Maryland Plant Sciences Building.

In late April, Local 26 began an informational picket line with signs stating that Respondent was unfair, and did not have a contract with Local 26. The picketing, which was sporadic until June, became a daily picket line in that month, and continued through November 1994.

On May 25, Graham sent a letter to Daniel Gambino, Respondent's Maryland project manager and vice president. The letter, which was addressed to Respondent's Hanover, Maryland office, informed Gambino that Local 26 was available to supply experienced journeymen electricians and apprentices to work at the jobsite. The letter notified Gambino that he would be speaking to Respondent's employees about being represented by Local 26.

Not having heard from Gambino, Graham sent another letter on June 7, again offering to supply employees for the project. Graham received no response to either letter.

In late July or early August, Graham, wearing a Local 26 jacket, saw Gambino and Job Foreman William Tyler at Respondent's job trailer. Graham testified that he asked Gambino if Respondent was hiring electricians and Gambino replied that he had to file an application at the company office. Graham then said that he was a Local 26 organizer, to which Gambino replied that the Company was not taking applications. Graham asked when applications would be accepted. Gambino replied that "all you union guys think that I have a crystal ball and know when I'm going to be hiring."

Gambino conceded that Graham at that time asked if Respondent was hiring, and wanted to fill out an application. Gambino testified that he "ignored" Graham. Gambino admitted receiving letters from Graham, but did not respond because he was not hiring at that time, and he was preoccupied with the projects which were ongoing.

Gambino testified that on November 4, 1994, he hired journeyman Kenneth Paul based upon Tyler's recommendation. Tyler told him that Paul used to work with a company that was unionized, and that he had some affiliation with a union.

John Finn, a member of New York Local 325, testified that just prior to Thanksgiving 1994, he appeared at the jobsite trailer, and asked Gambino and Project Manager Paul Campbell if they were hiring. A sign on the trailer said that no applications were being accepted. They asked about his experience, and he said he had been working in Binghamton, giving them the name of a nonexistent contractor. He did not tell them the name of the contractor, Gleason, for which he had been working since that company was a well-known union contractor.

Gambino asked if Finn heard of several contractors, which he named. Finn denied knowing of those companies. They were union contractors. Gambino told Finn that Respondent is a "merit shop," and that they would be hiring 10 people after January 1. Gambino took his name and phone number.

On December 21, Graham sent another letter to Gambino, again stating that the Union has qualified employees seeking work, and requesting Respondent's job qualifications and application forms. No response was received.

On December 27, Gambino hired Thomas Wilson. Wilson's application stated that he worked for Fischback and Moore, a union company, and also contained a 1982 certification of completion of the joint apprenticeship program, which is run by

the IBEW and the electrical industry. His most recent employment was with Becon, a company whose union affiliation was not known to Gambino.

Tyrone Jackson, a Local 26 member and journeyman, stated that, upon Graham's advice he visited Respondent's office in January 1995, wearing a Local 26 shirt.[10] He saw a sign which stated: "We are not accepting any applications for employment." He nevertheless entered the office and asked the receptionist for a job application. She asked who sent him. He said he was just "wandering around." She refused his request.

On January 23, Respondent hired John White. Campbell testified that he knew White before hiring him, since another employee, who worked for Respondent at its Kenner Army project, recommended him. Campbell asked his secretary to call White's former employers. I cannot accept Campbell's testimony that White's former employers, B E & K Construction, and S W & B Construction were union contractors, since Campbell received such information from his receptionist, and not first hand. In addition, Union Agent Graham testified that those companies were nonunion. Campbell also testified that he knew that another of White's prior employers, Fischback & Moore, was a union company. I accept that testimony. Gambino also gave positive testimony that Fischback was a union company. White last worked for Fischback in 1990.

The following day, January 24, Respondent hired Francis Hardesty. Gambino stated that he hired Hardesty upon a recommendation by employee Tom Wilson who received a bonus for the successful recommendation. Hardesty's application notes that he had 4 years' training at the Local 26 trade school. Gambino stated that he was aware of Hardesty's union affiliation at the time he hired him. Gambino conceded that at the time of hire, Respondent was not taking applications for employment. Union official Graham testified that Hardesty was a member of Local 26 in about 1976, but had not been a member since that time.

Less than 1 week later, on January 30, Gambino hired Anthony Rosasco. Nothing on his application indicates a union affiliation. According to Respondent's records, he worked from February to November 1995, when he was laid off.

On February 7, Graham, and Jerry Lozupone, a Local 26 business representative, went to Respondent's office with unemployed union members Thomas Gough and Kelly Simmons. They all wore Local 26 shirts. The sign that Respondent was not accepting applications was still posted.[11] The men asked the receptionist if they could complete applications for employment. She replied that the Company was not hiring or accepting applications.

Graham asked Gambino, who was present at the time, if they could complete applications. Gambino refused his request, stating that the Company was not hiring. Graham persisted, saying that since Respondent was on the job a long time, it appeared that it should be hiring now. Gambino again said that he was not hiring. Graham asked how Respondent did its hiring, and asked for application forms. Gambino replied that it was none of Graham's business how hiring was performed, and refused to provide applications. Graham gave Gambino his business card, and asked him to call when he needed employees.

Three days later, on February 10, Gambino hired Jeffrey Marsh. Nothing on his application refers to a union affiliation. He worked about 1 month.

On February 14, Graham sent a letter to Gambino advising that Local 26 had an "active organizing campaign in progress," and that his employees would be solicited by volunteer organizers and union members.

On February 16, Gambino hired Joseph Harmon. He was referred by his brother Jim Harmon, a journeyman, who had been employed by Respondent since September 1993. Joseph Harmon's application does not list any union affiliation.

On March 22, Bruce Messinese, was hired by Gambino. His application and resume do not list any union affiliation. He worked for Respondent for 10 months, until December 1995.

Five days later, on March 27, Gambino hired Brian Poe. He worked for Respondent for 9 months. Nothing on his application or resume indicates that he was affiliated with a union.

William Gallagher was employed by Respondent at its New York jobsite in February and March 1995. Following a layoff of 2 weeks, he was told that work was available in Maryland. He called Gambino, who he had known from his employment with Respondent in 1990. Gambino asked his qualifications, and hired him. Gallagher began work in Maryland on March 29. He had no union affiliation at the time of his hire.

On April 3, Robert Helms, was hired by Gambino. His application does not list any union affiliation.

On April 6, Graham again visited Respondent's office, with unemployed union members Thomas Barber, James Campbell, John Kirscht, Michael Lee, John Mudd, James Rapczynski, David Rohr, and Joseph Ruiz. They all wore union shirts and hats. Graham told the receptionist that they were present to apply for jobs. She replied that the Company was not hiring at that time, and not accepting applications. Graham asked for, and received permission to write a list of names, addresses, and phone numbers of those present. He asked, and she agreed that when hiring was undertaken, they would be called. Graham mentioned that the men were all qualified journeymen.

Four days later, on April 10, John Gianotti, was hired by Gambino. His application and resume do not indicate that he was affiliated with a union, and his current employer was set forth as B E & K, which was a nonunion company. His resume lists as a reference John Ey, a current employee of Respondent who was hired in November 1993, and worked for it at Maryland jobsites.

On the same day, April 10, Ronald Gallagher was hired upon a recommendation from his brother, William, who had begun work on March 29. Ronald had worked for Gambino at another job in 1990. Gambino called him, told him that he remembered him from the prior job, and hired him.

On April 12, Isaac Barrett went to Respondent's jobsite trailer at union official Graham's suggestion, and asked employee Scott Lehet about a job. Lehet phoned William Tyler, the job foreman, and according to Barrett, Lehet may have been joking but told Barrett, before Tyler arrived, that the Company

[10] The union shirts bore a readily identifiable IBEW logo.

[11] Whenever Graham visited the office thereafter the same sign was posted.

would not hire anyone from the union because they believed that doing so would "cause problems for the job." Although Barrett testified that he did not know if Tyler was present when Lehet made that comment, it is clear that he was not because this conversation occurred when Lehet was calling Tyler on the radio, and thus Tyler was not present. Employee William Gallagher stated that he was present during a similar conversation between Barrett and Lehet which occurred 2 days after Barrett was hired.

When Tyler arrived at the trailer, Barrett told him that he was new to the area, seeking work, and wanted to complete an application. Tyler replied that the Company was not hiring. Barrett handed Tyler his resume, which listed all nonunion contractors, and asked for an application. Tyler kept the resume, gave him an application, and said that he would call him in a day or two.

The following day, April 13, Barrett called Tyler, and asked if he looked at his resume. Tyler said he had and that Barrett would be hired. In fact, Tyler spoke with Gambino about Barrett's qualifications and resume. Tyler recommended Barrett's hire, and Gambino agreed. Tyler asked Barrett to report for work the following Monday, April 17. Barrett worked on the project for 1 year. When he was laid off he was offered a position in Virginia, but rejected the offer. At the time of his interview and hire, Barrett was not a member of Local 26, and did not mention the fact that he was referred by the Union.

John Finn, who as set forth above, testified that he visited the jobsite in November 1994, and was questioned concerning his prior employment, had not been contacted by Respondent, and on April 14, 1995, he again visited the jobsite. Campbell told him that Respondent was not accepting applications, and had just hired six men.[12] Campbell asked if he contacted Respondent's main office in New York. Finn said that he had not. Campbell gave him the address and phone number.

On May 15, Timothy Shiflett, was hired by Gambino. Nothing on his application indicates that he was affiliated with a union.

On May 17, Monte Brown and Steve Williams, union members and journeymen, visited Respondent's office, wearing union shirts. They asked the receptionist to speak to someone about a job, for permission to file an application, and to leave their names and phone numbers. Their requests were denied.

On May 30, Randall Foster, was hired by Respondent. Campbell testified that during his interview of Foster, Foster told him that his prior work involved the shutdowns of nuclear plants and paper mills. Foster identified the contractors, who Campbell knew to be union companies. Campbell then hired Foster. Foster's application noted that he had 20 years' experience, but it did not list any companies for which he had worked.

In late May or late June, William Gallagher recommended Neal Dupont for hire. Gambino called him, but he was not hired.

On July 31, Earl Burdette, was hired by Gambino, who testified that he was asked by the foreman for a union insulation company at the jobsite to consider hiring Burdette. Gambino interviewed Burdette and hired him. Gambino stated that he did not know whether any of the companies listed on Burdette's application were organized.

On August 24, Oscar Cavin, was hired by Respondent. His application does not list any union affiliation.

On August 30, Finn went to Respondent's New York office, and told the receptionist that he was seeking work, and had been referred by Campbell and Gambino. The receptionist told him to leave his name and phone number, which he did. Thereafter, Finn was not contacted by Respondent. He never mentioned his union affiliation to any company representative. Both Campbell and Gambino deny speaking with Finn at any time.

On October 2, Billy Boutwell, was hired by Gambino. His application lists as a reference employee Tom Wilson, and does not mention any union affiliation.

On December 5, Graham sent a letter to Gambino, advising him that Local 26 was engaged in an "active" organizing campaign, and that employees Isaac Barrett and William Gallagher would be speaking to their coworkers in an effort to interest them in representation by that union.

On February 19, 1996, Richard Maines, was hired by Gambino. His application stated that he worked for 18 years for a company, which was affiliated with Local 26. Gambino looked at his application while interviewing him. His application shows that he last worked for that union company in 1990, and had worked since then for two other companies whose union status was not testified to.

Gambino testified that he hired employees with known union affiliations. Thus, in July 1993, Scott Lehet was hired. Lehet worked with Local 26, but Gambino was aware that Lehet was outspoken in his opposition to unions. In September 1993, Respondent hired Jim Harmon, who was known to be an apprentice with Local 26. In November 1994, Gambino hired Kenneth Paul. Gambino was told by Tyler that Paul used to work with a unionized company.

Gambino testified that he was not aware of any employee he hired since January 1995, other than Maines, whose application reflected that he was a union member or was working for a union contractor.

Payroll records establish that Respondent employed subcontractor Bopat Electric Co. as a subcontractor to perform work at the University of Maryland jobsite. Such work took place each week from March 5 through May 21, 1996. From five to eight Bopat electricians, who worked under Respondent's supervision, were employed for varying hours each workday during that period of time.

D. Evidence of Manpower Shortages at the Maryland Project

On February 29, 1996, Curtis Harris, the vice president of Tompkins Builders sent a letter to Respondent, in which he refers to previous correspondence in which he requested that Respondent increase its manpower. In response to the prior letters, Gambino advised that Respondent would increase its personnel by six people on February 26. He advised Gambino that six would not be adequate for Respondent to "keep up with the pace of the project," and he told Gambino that even with the

[12] In fact, six men had been hired during the period March 22 to April 10, 1995.

six men, Respondent would have to work Saturdays to avoid delaying the progress of the job.

Harris' letter continues that when the six additional men did not appear by February 28, he phoned Respondent's office and warned that it would be held responsible for all damages if the project was not completed by May 25. Also on February 28, Gambino told Harris that he was attempting to obtain additional manpower. Harris warned that Respondent's work on the project "was falling further behind" and that Harris could not let the project be delayed while Respondent "searched" for additional personnel. Also that day, Harris was informed that Gambino "located another source of manpower" and that five men would be at the jobsite on February 29. Only four arrived. Harris concluded that he considered Respondent's "manpower levels to be clearly inadequate to prevent serious project delay." Harris suggested that Respondent work 10-hour shifts 6 days per week "to overcome your current and past delays."

Respondent's president, Nelson, replied by letter of March 1, conceding that "we agreed to bring in some additional men to help you accelerate the project and subsequently failed to get them on the day promised," but noted that he believed that Respondent's progress at the site has been equivalent to the progress of the overall job.

Thereafter, in a series of communications between May 28 and August 12, Tompkins accused Respondent of not having adequate manpower and supervision on the job, and failing to meet deadlines for the completion of its work, and threatening to assess liquidated damages against it. In response, Respondent asserts that it always met its deadlines, but that Tompkins' mismanagement of the project, and failures of other trades to complete their work hampered Respondent's progress in its work.

Employee William Gallagher testified that in mid-June 1995, he heard Gambino tell Tyler that there might be a need for more employees. Tyler responded that he did not want to hire employees only for a couple of weeks and then lay them off.

E. Respondent's Hiring Policies

Respondent's president, Mark Nelson, testified that in early 1994, he directed that signs be placed in all its offices and jobsite locations, which stated that "we are not accepting any applications for employment." Prior to that time, Respondent accepted applications for employment. Nelson stated that the decision to place the signs was not motivated by a desire to avoid union applicants.

Rather, the decision was made because Nelson believed that the receipt and filing of applications was not "productive" in that the applications became stale quickly if they were not followed up within 1 or 2 weeks, and the applications of those who were qualified were of no use if not followed up quickly because they usually found jobs elsewhere. Further, Respondent's Endwell, New York office is located near an IBM facility which had laid off many employees recently, and many unqualified applicants had applied for work, which was becoming a "bother."

Respondent's hiring policy consists of the following: (a) there must be a need for employees, and Respondent must be hiring; (b) other jobsites are checked to see if employees can be transferred to the job at which workers are needed; (c) employees who were laid off and receiving unemployment insurance are contacted to see if they are available for work; and (d) inquiries are made among Respondent's employees, and at the jobsite to see if anyone knew electricians looking for work in the area. If the prospective employee is referred by someone who can vouch for his work and character and give a "positive referral," he would be seriously considered for employment.

Respondent offers a monetary recruiting bonus to its employees if they (a) recommend a personal acquaintance who is seeking work and (b) the person is hired.

Gambino testified that Respondent hires on a referral basis, and although Union Agent Graham was referring employees to it, he (Gambino) must know and trust the referring party. Since Gambino did not know Graham, he did not know that the electricians he referred were qualified. Gambino conceded that he knew that the employees Graham referred were union members, and he also thought that if he hired them they would attempt to organize his employees. Nevertheless, Gambino insisted that his hiring decisions were not made in order to avoid unionization of the Company. He stated that he has hired union affiliated employees in the past, and seeks only employees who are willing and able to work.

Gambino explained his hire of Isaac Barrett upon the basis that Barrett appeared at the jobsite at the right time. Tyler reviewed his resume there, spoke to Gambino about his qualifications, and recommended his hire. Gambino conceded that he hired Barrett notwithstanding that Barrett was not a former employee, and had no referral, and no contact with anyone in Respondent.

Project Manager Campbell testified in this connection that in order to trust such a referral, it must be from someone he knew. In this connection workers who occasionally appeared at the jobsite unannounced, who would be considered for employment if they arrive at a time when Respondent is seeking help.

IV. ANALYSIS AND DISCUSSION

A. The Supervisory Status of Tyler and Winters

The complaint alleges, and Respondent denies that William Tyler and Alan Winters are statutory supervisors.

Mark Nelson, Respondent's president, testified concerning its hierarchy. Directly below the president, and reporting to him are Respondent's project managers who are in overall charge of the various jobsites at which the Company performs work. Those project managers are Paul Campbell, Daniel Gambino, Dean Rypkema, and Andrew Stebner. Their responsibilities include managing the projects, developing budgets, staffing the job, purchasing materials, and scheduling the work.

The next level of authority is the job foreman. The foreman is a journeyman who is selected, according to Gambino, on the basis of the technical nature of the project, and the availability of personnel qualified to act as foreman. The person best able to act as foreman, considering the complexity of the work to be performed, is assigned to the position. Campbell added that the foreman is selected based upon his experience, knowledge, and leadership ability. A journeyman may be a foreman on one job, and a regular worker on the next job.

The foreman works under the direction of the project manager, and ensures that the project is performed the way the project manager directs. The foreman makes sure that the electricians have the material they need, and that they are performing their assignments. The foreman coordinates the progress of the job with the project manager. Gambino testified that the foreman is in charge of day-to-day productivity, scheduling, and coordination with other trades, and makes sure that the electricians have work to perform. The foreman makes up the daily work schedule, and the project manager together with the foreman "works out" the weekly schedule. Campbell stated that the foreman is responsible to "implement" the work schedule.

The personnel files of Tyler and Winters stated that they both attended supervisors' conferences on planning in the fall of 1994.

The foreman receives an additional dollar per hour in pay while he serves in that capacity. He receives no other monetary or other benefits.

Nelson testified that the foreman has no authority to hire, fire, layoff, or discipline the employees, and that Tyler and Winters have not performed any of those functions. He stated that all hiring is done by the project managers, and that discharge and discipline are performed by either himself or the project manager. However, Nelson noted that the foremen may have recommended someone for hire who they knew, but that their recommendation would be treated the same as any other recommendation from any other person.

Gambino testified that the Maryland job began in June 1993. He stated that for the first few months thereafter, he was present at the jobsite only intermittently, not even once per week. Then he moved to Maryland, and in 1995 was at the jobsite perhaps three times per week. Later, in early to mid-1995, he was there every day. On those days that he was not at the jobsite, he was in contact with it by phone two or three times per day.

Gambino testified that Tyler recommended Barrett's hire. Gambino was not at the site at that time, and Tyler spoke to Gambino, advising him of Barrett's qualifications, and reviewing his resume. Gambino approved Tyler's recommendation. Gambino further stated, however, that other employees had recommended that various people be hired, and that he did not give Tyler's recommendation any greater weight because he was a foreman. It should be noted, however, that Tyler apparently ignored Respondent's policy regarding not accepting applications by giving Barrett an application. Not only did Gambino not reprimand Tyler for this, he approved Tyler's recommendation of Barrett.

With respect to discipline, Gambino testified that Tyler could recommend discipline of an employee, but that he would have to "clear it" with him. Gambino stated that Tyler recommended the immediate discharge of an employee for insubordination and poor productivity. Gambino discussed the matter with Tyler, and then Gambino spoke with the worker and resolved the problem. Gambino told Tyler that he wanted to give the employee another chance, and he was retained. In another instance, Tyler told Gambino that an employee was a poor worker and had a bad attitude, and requested that he and Gambino speak to the worker. Tyler wanted to give the employee another chance and retain him, but during the discussion the worker did not show any indication that his attitude would improve. Gambino then decided to, and did fire him on the spot.

With respect to discipline, Barrett testified, however, that he saw Tyler criticize employees on at least two occasions. In one incident, he ordered an electrician to work on exterior lighting. The man protested, saying he was not wearing sufficiently warm clothing. Tyler directed that he either go out and do the job or go home. The man complied. In another instance, Tyler told a worker who made a mistake in roughing in, to look at the blueprints and architect's drawings.

A case cited by Nelson, the discipline of Peter Gambino, the brother of Daniel, does not prove the point. At that time, Peter was the foreman on a two-man job. His poor work habits and attitude became known to Nelson who spoke to him about those matters. Obviously, since Peter was the foreman, the only person who could discipline him was brother Daniel the project manager, or Nelson. Nelson also noted that he spoke to employee Tom Wilson about his poor work performance.

Employee Barrett stated that Tyler asked the workers about their progress on various job assignments, and if they had any problems. He did not regularly work with his tools, but did a small amount of electrical work from time-to-time. He carried a radio and a clipboard. He occasionally gave Barrett directions concerning the work, and assigned him to various jobs. Tyler attended job meetings with the general contractor, and the other subcontractors.

Barrett added that he requested time off on two or three occasions, following the "job rule" that if 1 day's notice was given, the employee could take time off. Barrett also testified that Gambino directly supervised employees on the job, and that toward the end of the job, Tyler told Barrett that he (Tyler) would "supervise" the bottom three floors of the project, and Gambino would supervise the top three. There were 25 to 28 electricians on the job at that time. That procedure was followed.

Ronald Gallagher testified that he saw Tyler twice per day, during which time he examined the work being done, and made sure that everyone was performing their assignment. Tyler also conducted weekly job meetings, at which the job's progress was discussed. He asked the employees to work more quickly.

William Gallagher testified that when he reported to work, he went over the job with Tyler, who showed him the blueprints, and assigned him to work. Gallagher went to Tyler with questions about the work, and requests for time off.

With respect to layoffs, Gambino testified that he, and not Tyler, determined who would be laid off. Gambino recommended layoffs of specific persons to Tyler, and asked for his opinion on Gambino's selections, which were based upon Gambino's assessment of the worker's productivity. Gambino and Tyler "jointly agreed" on who they believed were the least and most productive workers, and who therefore deserved to be retained.

Gambino testified that Tyler had no power to authorize the performance of overtime work. In fact, according to Gambino, Tyler recommended additional overtime on several occasions, which Gambino rejected. Gambino investigated the situation at the jobsite in order to determine whether overtime work was

needed. Gambino offered suggestions, such as transferring other workmen to the area where they were needed, in order to avoid the expenditure of overtime wages.

Gambino testified that a foreman does not have the independent authority to authorize time off. However, if for example an employee needed to take one hour off to see a dentist, the foreman could authorize that time off, but he could not approve the employee's taking a day off. In such a case, and also when vacation time is requested, the worker completes a form and gives it to his "immediate supervisor, the job foreman . . . . Tyler" who sends it to the project manager, and then to the accounting department.

Nelson stated that the foremen work with their tools depending upon the size of the project. On a small job, they worked almost exclusively with their tools, but as the job grew in number of employees employed, the responsibilities of the foreman increase in terms of ensuring that the workers complete their assignments. Accordingly, on such a job, the foreman does less work with his tools. Gambino testified that in the beginning of the job, Tyler spent about 70–80 percent of his time working with his tools, but as the job progressed and more employees were employed there, he worked with his tools only 10 percent of the time. Toward the end of the project, he worked more with his tools.

The foreman has no special insignia on his uniform indicating his title. He had access to a company truck, which he drives to and from the jobsite, and which is used on the site by others, including laborers who bring material to the work area. He, as well as other electricians, and laborers use radios on the job to communicate with other workmen on the site, and also to coordinate operations with other trades.

Andrew Stebner was the project manager for the New York projects, including Harris Hospital. The foreman for that project was Alan Winters. Stebner testified that Winters worked with his tools 95 percent of the time. Stebner, who was at the jobsite two times per week depending upon the status of the 6-day-per-week job, set the manpower levels for the project, ensuring that enough workers were present to complete the project on time. Stebner managed other projects at the time of the Harris Hospital job, and stated that when he was not present, Winters was the only foreman on the job.

William Gallagher, David Harageones, and Douglas Nelson were employed at Harris Hospital. Gallagher, who worked at that job for 1.5 months, testified that since the job was undermanned, Winters worked with his tools 95 percent of his time. He also checked on the employees, making sure that they were performing the work assigned. Nelson, who worked at that job for 3 to 5 months, stated that Winters "ran the job," making assignments of work, and making sure that the employees were doing their work. He estimated that Winters spent 50 to 60 percent of his time working with his tools.

David Harageones testified that at his meeting with Respondent's attorney, Rypkema, President Nelson, and Stebner, he was told that he was assigned to the Harris Hospital job, at which Winters was the "boss" on the job, and to whom he would report directly. Harageones further stated that Winters laid out all the work for the electricians, and directed them where to work, and what jobs to work on. He assigned Harageones to a job upon his arrival at the jobsite. Winters did layout work, as did other journeymen. Harageones asked questions of Winters concerning the work. He also received permission from Winters to leave work early a couple of times. Winters once asked Harageones to work overtime and Harageones refused, without any discipline being imposed for his refusal.

In addition, when subcontractor Radec was on the job, Winters completed and submitted payroll sheets for Radec's employees, certifying that they had worked the number of hours set forth thereon, and authorizing payment for their services.

The evidence is clear that Tyler and Winters are statutory supervisors.

The Board has found that such electrical foremen are supervisors where they perform the same duties as did Tyler and Winters. Thus, Tyler and Winters were the highest ranking representatives of management at the jobsite, and when the job increases in size, they spend most of their time, according to Nelson and Gambino, making sure that the employees are doing their work. *Garney Morris, Inc*., 313 NLRB 101, 114 (1993).

Tyler and Winters also had the authority, which they exercised, to assign and responsibly direct other employees. They checked the employees' work, and asked the workers to correct improperly performed jobs. They also permitted employees to leave work early if given advanced notice. They also represented management and attended job meetings with the general contractor and other subcontractors. *Meisner Electric,* 316 NLRB 597, 599–600 (1995); *Debber Electric*, 313 NLRB 1094, 1096 (1994).

Employees were told that they were to work under the direction of the foreman, and Gambino referred to Tyler as the "immediate supervisor" of the employees. In addition, the foreman coordinates the work with other trades, makes sure that the work gets done, and keeps time records, including daily work schedules. Although there was evidence that Gambino reversed Tyler's recommendations as to discipline, there is other evidence, which I credit, that Tyler told an employee to do a certain job or leave the project. His judgment was also sought by the project manager, as to which employees should be retained or laid off. The additional $1 per hour is also evidence that the foreman had a higher status among the employees. *Windemuller Electric*, 306 NLRB 664, 666 (1992).

I accordingly find and conclude that Tyler and Winters are supervisors within the meaning of Section 2(11) of the Act.

B. The Alleged Violation of Section 8(a)(1) of the Act

The complaint alleges that on about April 24, 1995, at the Maryland jobsite, Respondent acting through Tyler, informed an employee that Respondent would not hire union members because they would create problems.

The evidence, as set forth above, does not establish that Tyler made such a comment to Barrett. Rather, employee Scott Lehet told Barrett, prior to Tyler's arrival at the trailer, that the company would not hire anyone from the union because they believed that doing so would "cause problems for the job."

Lehet has not been alleged as an agent or supervisor of Respondent. Barrett characterized Lehet's duties as "for the most part a regular journeyman." He occasionally carried a radio, but

many journeymen did so, and he occasionally assumed Tyler's duties in his absence, which was no more than three or four times, during which times he took attendance, and asked Barrett if he had enough work for the day. William Gallagher testified that when he first arrived at the job "they" told him that Lehet was his foreman. Nevertheless, he gave no evidence as to Lehet's responsibilities.

Under these circumstances, I cannot find that Lehet was an agent or supervisor of Respondent, and I will dismiss this allegation of the complaint.

In his brief, General Counsel urges that I find a violation of Section 8(a)(1) of the Act in employee Douglas Nelson's testimony that in late September or early October 1994, he heard Winters tell Stebner that he (Winters) would rather hire Respondent's employees from Binghamton, rather than hire anyone in Sullivan County, "because of the union," and that they did not want "to hire anybody union." This was not alleged in the complaint as a violation of the Act, and in fact during the hearing, General Counsel stated that Nelson's testimony was offered only as evidence of background and Respondent's motivation, and that he sought no findings of violations or remedy for such statements.

In any event, no details were given of the circumstances surrounding this conversation, including whether Winters or Stebner reasonably believed that Nelson could hear their conversation, and whether the remark was intended to be heard by Nelson. In the absence of such evidence, I cannot find that the comment violated Section 8(a)(1) of the Act.

However, I find that Winters' remark constitutes evidence of Respondent's illegal motive in refusing to consider the union applicants for hire.

C. Respondent's 10(b) Argument

As set forth above, on October 18, 1993, Salvatore completed an employment application at Respondent's premises. In May 1994, he asked to update his application and was told that that was not necessary, since it would remain on file, and that Respondent was no longer taking applications.

On April 4 and 10, 1994, Spicer and Daniel Harageones, respectively, completed and filed applications with Respondent.

In early June 1994, Harageones called the office and advised the receptionist that he wished to update his application, which was on file. She said that if his application was still on file, she would have the owner call him.

In November 1994, Spicer called Respondent's office, indicating his continued interest in a position, and the fact that he had applied in April, and had not been hired, but employee Martin Shaw had been hired. The receptionist said she was not accepting applications, but that she would have someone call him.

The complaint alleges that Salvatore, Spicer, and Harageones were refused hire and/or refused consideration for hire on June 12, 1994.

Respondent argues that the charge in Case 3–CA–19035, filed on December 12, 1994, was untimely filed with respect to Harageones, Salvatore, and Spicer. The charge alleges that certain employees were not hired or refused consideration for hire because of their membership or activities in behalf of Local 325.

In order for the charge to be timely filed, the alleged unlawful activity must have taken place on or after June 12, 1994. Respondent contends that inasmuch as the three individuals all testified that they originally applied for work prior to June 12, and were not hired at that time, the charge was therefore untimely filed.

General Counsel argues that although the applications were made outside the Section 10(b) period, their applications were "continuing in nature" and that every refusal to hire is a separate violation, and each time there is a discriminatory refusal to hire, a separate, actionable unfair labor practice occurs.

Local 26 argues that Harageones, Salvatore, and Spicer were all told that their applications would remain on file and nothing further needed to be done to revive them, and that Respondent's failure to consider them each time it filled its hiring needs constitutes an unfair labor practice, and that each time Respondent hired a journeyman other than those three men, it was in effect refusing to hire them.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board . . . ."

The charge here was filed on December 12, 1994. The 6-month period would ordinarily begin to run on June 12, 1994.

The Board has not adopted the continuing violation theory in respect to the facts above, where applications remain on file. *South East Coal Co.,* 242 NLRB 547, 550–552 (1979).

Rather, as the Board stated in *Great Lakes Chemical Corp*., 298 NLRB 615 fn. 2 (1990):

> because the [applicants] were not expressly denied employment and each of their employment applications continued to be on file throughout the period of implementation of the unlawful hiring policy, the Charging Party had no clear and unequivocal notice of the 8(a)(3) unfair labor practices within 6 months of the filing of the charge.

Similarly, here the applicants were not expressly denied employment. Salvatore and Harageones were told that it was not necessary to update their applications, impliedly being told that their applications were still under consideration, and in addition, Harageones and Spicer were told that a company representative would contact them.

Accordingly, I find, in accordance with *Great Lakes*, that since they had not received outright rejections of employment, and by receiving assurances that their applications were still under review, and that a company agent would call them, the Union was not placed on notice, prior to the tolling of the 10(b) period, that the Act had been violated. I therefore reject Respondent's argument that the complaint allegations concerning Daniel Harageones, Salvatore, and Spicer should be dismissed.

D. David Harageones

The complaint alleges that Respondent failed to recall or reemploy David Harageones because of his union activities.

As set forth above, Harageones was reinstated following a Board decision, which found that his layoff was not unlawfully motivated. He testified that upon hearing in October 1994, from

Douglas Nelson that Stebner told employees not to speak to him, he began an unfair labor practice strike 1 month later, on November 7. It is clear that whether or not it was an unfair labor practice strike, he engaged in protected activity by striking. President Nelson conceded that Harageones engaged in a strike.

In its brief, the Union argues that inasmuch as Harageones engaged in an unfair labor practice strike in protest of Respondent's order that other employees not speak to him, he was entitled to an offer of reinstatement upon his January 6, 1995, unconditional offer to return.

First, there is no complaint allegation that Harageones was engaged in an unfair labor practice strike. No unfair labor practices have been alleged or proven with respect to the remarks made to Douglas Nelson. As discussed, infra, General Counsel stated that he was not seeking a finding of violation as to such statements.

Nevertheless, even if no unfair labor practice is alleged or proven, or if the alleged unfair labor practice allegation, if filed, was dismissed, the striker becomes an economic striker and is entitled to an offer of reinstatement upon his unconditional offer to return to work. *Martel Construction*, 311 NLRB 921, 927 (1993).

Upon Harageones' offer to return which was made on January 6, 1995, Respondent became obligated to offer a position to him, unless it could prove that it had permanently replaced him. He had not been permanently replaced since William Gallagher was hired in early February, and in mid-February, was assigned to the Harris Hospital job, which was the location at which Harageones worked prior to his strike.

I accordingly find and conclude as alleged in the complaint that Respondent unlawfully failed to recall or reemploy David Harageones in mid February 1995.

E. The Refusals to Hire and/or Consider for Hire the Union Applicants

The legal standard for determining whether an unlawful failure to hire or consider for hire union applicants is as follows:

Essentially, the elements of a discriminatory refusal to hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. *Big E's Foodland, Inc*., 242 NLRB 963, 968 (1979).

In addition, the test set forth in *Wright Line*, 251 NLRB 1083 (1980), must be met. Under that test, the General Counsel must first make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's action. Such a showing includes the facts that the employer possessed knowledge of the employees' protected activities, and animus toward such activity. The burden then shifts to the employer to demonstrate that it would have taken the same action notwithstanding the protected conduct. Such a test is applicable here. *Fluor Daniel, Inc*., 311 NLRB 498 (1993).

F. The New York Jobsite

Respondent's knowledge of the union affiliation of the applicants is amply demonstrated. Thus, in October 1993, Salvatore's filed application listed his union affiliation. Similarly, the applications of Spicer and Daniel Harageones, filed in April 1994, listed their union affiliations.

On September 28, 1994, Rockafellow mailed applications of the other named alleged discriminatees to Respondent's office. The certified letter was marked refused, but the package sent regular mail was apparently received, as it had not been returned to the Union. Further, on December 15, Rockafellow handed the applications to Winters at the jobsite. Those applications, being forwarded by the Union, were sufficient to provide Respondent with knowledge of the Union affiliations of the applicants. *Eldeco, Inc*., 321 NLRB 857, 870 (1996); *Fluor Daniel, Inc*., supra; *Ultrasystems Western Constructors*, 310 NLRB 545 fn. 2 (1993).

Respondent argues that it did not have to accept or consider the applications because of its posted policy of not accepting applications for employment, and therefore should not be charged with knowledge of the union affiliations of the applicants. However, as will be shown, infra, that policy was not adhered to, and I find that it was utilized in order to provide a basis for its discriminatory failure to consider union applicants.

A finding that Respondent possessed union animus may be found in this record. Thus, the Board has found that, in violation of Section 8(a)(1) of the Act, Respondent by project manager Rypkema, prohibited an employee from wearing a union cap, and threatened to take civil and criminal action against Local 325 representative McPherson for entering onto property, which Respondent did not control. *Nelcorp*, supra. It must also be noted that in that case, Respondent was not found to have violated the Act by laying off and refusing to recall employee David Harageones. Respondent's animus toward the Unions in the past provides support for a finding of animus here. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996).

In addition, employee Douglas Nelson gave credited testimony that he was told by Stebner that he should not speak to, and should stay away from David Harageones and McCabe who were picketing the jobsite, because he may get in trouble. Nelson also gave credited, uncontradicted testimony that he heard Winters tell Stebner that he would rather hire Respondent's employees from Binghamton than others from Sullivan County because of the union, and that they did not want to hire "anybody union."

When the record of hires is analyzed in light of the (a) efforts of the union applicants to be considered or hired and (b) the actual hiring done, no other conclusion may be drawn than discriminatory hiring practices were in place to thwart and prevent the hire of union affiliated applicants.

Thus, in October 1993, union applicant Salvatore applied for a job, and in April 1994, union applicants Spicer and Daniel Harageones completed and filed applications.

In early September, Respondent hired Boyes and McCabe. Boyes came to Nelson's attention as a fellow church member, and had last worked as a union electrician 8 years before, when he left the electrical industry to study for the ministry. McCabe had previously worked with Winters on another project. The

testimony was not clear as to whether McCabe's extensive union employment history and position in Local 106 was known to Winters or Stebner at the time of his hire. His application, which listed that information only became available to Stebner after his hire.

In mid-September union organizer Rockafellow told Winters that union applicants were available for hire, and later that month, on September 28, brought applicants to the jobsite. Winters said that he did not know when or whether any employees would be hired. At about that time, employee Nelson overheard Winters tell Stebner that they did not want to hire "anybody union."

Nevertheless, within the next three weeks, Respondent hired four employees, Shaw, Streeter, Sprouse, and Clark. None of their applications lists any union affiliation.

Thus, Respondent hired four employees with no known union affiliation shortly after being advised that union applicants were available.

Three weeks later, on November 7, Spicer called Respondent and asked about a job, reminding the receptionist that his application had been on file since April. He was told that no applications were being accepted.

In early December, an advertisement, for journeymen was then placed, pursuant to which, according to president Nelson, one journeyman was hired. That person may have been Eric Liepens, who was hired on December 7. His application did not list any union affiliation. Russo was also hired, on December 5. As set forth above, there is a question as to whether he was a journeyman. Also, during the one-month period that the advertisement ran, journeyman Williams was hired. Thus, Respondent hired at least two journeymen during the time the ad was in effect.

Thus, after Winters told Rockafellow that he did not know when or whether employees would be hired, Respondent hired employees with no known union affiliation, and ran an advertisement for employees during which period additional employees, also having no known union affiliations, were hired.

On December 10, Schlott and Schwatz, without revealing their union affiliations, were first told that no applications were being accepted, but then when they said they were from Sullivan county, were encouraged to wait for the "boss" to interview them, as the employer sought to hire such applicants. In a phone conversation between the receptionist and the "boss," the receptionist, in looking at the applicants, and then saying "maybe, possibly, could be," implied that the person she was speaking to was inquiring about their union affiliation.

In *GM Electrics*, 323 NLRB 125 (1997), the Board found that a receptionist's phone comments concerning job applicants, that "I know he's union. They're all union" (a) were coercive in violation of Section 8(a)(1) of the Act, (b) indicated "adverse treatment" of union applications, and (c) were proof of animus sufficient to support a prima facie showing that the applicants' union affiliations were a motivating factor in the employer's failure to hire them.

Here, there is no allegation that the receptionist's statements violated the Act, and I would not so find. The evidence in this case is not as strong as in *GM*, but a fair inference may be made that the comments made here by the receptionist, although not expressly identifying them as union members, reflected a concern by the speaker that they might have union affiliations. This is especially so considering that they were initially told that the employer sought to hire workers from Sullivan County, told to wait for the boss for an interview, but then following this conversation were abruptly dismissed.

On December 14, Williams, was hired by Respondent. His application does not list any union affiliation.

On December 15, Rockafellow hand delivered six applications to Winters. In early February, 1½ months later, Respondent hired William Gallagher, a person who had worked for it 4 years earlier.

During January and February 1995, Respondent employed a substantial number of employees from subcontractor Radec who worked full time during a 1-month period. Although Respondent employed subcontractors in the past, the timing of its use of Radec here is suspicious. Thus, only 1 month before, Rockafellow presented Respondent with union applicants who were ready to work. Those six applicants could have performed the work done by the two to five Radec electricians. Respondent's reason for not hiring full-time employees, that the job was 50-percent complete, and the remainder of the assignment was for only a 4-to-6 week period, does not ring true, since (a) Williams, whose application bears a notation "temp 4–6 wks," was employed for 5 weeks, beginning on December 14, and laid off and (b) William Gallagher, who began work in mid-February, was employed for about 6 weeks and then laid off.

The above evidence establishes the elements required for General Counsel's prima facie showing that the union applicants' union affiliations were a motivating factor in Respondent's failure to consider them for employment. *Wright Line*, supra. Thus, the affiliations were known to Respondent in the applications which were completed at its office, forwarded to its office, and hand delivered to Winters. Respondent's animus is established as set forth in the prior case, and the comments by supervisor Winters. Further, the fact that none of the applications in which the applicants evidenced a current, active union involvement was considered is "sufficient to warrant an inference of animus against union members and sympathizers." *Eldeco, Inc.,* supra at 870.

G. The Maryland Jobsite

Respondent's knowledge of the union affiliation of the applicants who are named in the complaint is well established. As set forth above, each of the named individuals appeared at Respondent's offices either alone or in the company of union organizer Graham, and all wore union shirts, and on the April 6 visit, those present wore union hats. *Casey Electric*, 313 NLRB 774, 785–786 (1994); *AJS Electric*, 310 NLRB 121, 125 (1993). See the above discussion of Respondent's animus.

The Union first made its presence known during picketing in April 1994, which continued through November 1994. Thereafter, the Union made contact with Respondent through correspondence, and a personal contact between Graham and Gambino, which occurred in the summer of 1994.

Hiring began in early November 1994, with the hire of Kenneth Paul. Tyler recommended him to Gambino, who testified

that Tyler said Paul was formerly employed by a unionized company, and had some union affiliation.

Thereafter, in late November, union member Finn, who did not acknowledge his union affiliation, was closely questioned by Gambino and Campbell about his prior experience, specifically asking about certain named, union contractors.

Respondent hired Wilson on December 27, 1994, who had listed a union company as his employer prior to his last employment, and also noted that he completed a union apprenticeship program 12 years earlier.

The union applicants first made their presence known in January 1995, when Jackson visited Respondent's office wearing a union shirt. He was denied the opportunity to file an application.

On January 23, Respondent hired John White, whose current employment was with nonunion companies. He last worked for union employer Fischback in 1990. The next day it hired Hardesty, whose application notes 4 years' training at the Local 26 trade school, but had not been a member of that union since 1976. On January 30, Respondent hired Rosasco. His application does not indicate any union affiliation.

One week later, on February 7, union applicants Gough and Simmons appeared at Respondent's office wearing union shirts. Gambino refused their requests to file applications, and told them that Respondent was not hiring.

Nevertheless, 3 days later, Gambino hired Marsh. Nothing on his application indicates that he had a union affiliation. One week later, on February 16, Gambino hired Joseph Harmon. His application does not list any union affiliation, but he was referred by his brother, an employee of Respondent. About 1 month later, on March 22, Gambino hired Messinese. His application lists no union affiliation. Five days later, on March 27, Gambino hired Poe. His application lists no union affiliation. Two days later, William Gallagher began work, having been offered work from the New York jobsite. Five days later, on April 3, Gambino hired Helms. His application lists no union affiliation.

On April 6, union applicants Barber, Campbell, Kirscht, Lee, Mudd, Rapczynski, Rohr, and Ruiz appeared at Respondent's office wearing union shirts, and requested applications. The receptionist told them that Respondent was not hiring at that time. She agreed to call them when hiring was being done.

Nevertheless, 4 days later, on April 10, Gambino hired Gianotti, whose application does not indicate any union affiliation, but includes as a reference a current employee. On the same day, Ronald Gallagher was hired upon the recommendation of his brother, William. Two days later, on April 12, nonunion employee Barrett inquired about a job at the jobsite. Although Tyler told him that Respondent was not hiring, Barrett presented Tyler with a resume, which listed all nonunion contractors. The following day, Barrett was told he was hired. One month later, on May 15, Shiflett was hired by Gambino. Nothing on his application shows a union affiliation.

Two days later, on May 17, union applicants Brown and Williams were denied an opportunity to file applications at Respondent's office.

Thereafter, Respondent hired Foster, Burdette, Cavin, Boutwell, and Maines.

As set forth above, notwithstanding that available manpower was available through the Union, it appears that its project was severely undermanned as set forth in the correspondence between the general contractor and Respondent. In response to that shortage of employees, Respondent employed a subcontractor with a significant number of electricians, who worked under Respondent's supervision each week from March 5 through May 21, 1996.

The above facts establish that General Counsel has made a prima facie showing that the union applicants' affiliations were a motivating factor in Respondent's refusal to consider them for hire. Thus, all of the employees refused permission to file applications wore union insignia when they attempted to file applications at Respondent's office. Although no applications were in fact filed, "actual application is not required, however, where applying would be futile." *Sunland Construction Co*., 311 NLRB 685, 686 (1993).

Here, applications were prohibited from being filed by Respondent as part of its hiring policy. As will be discussed, infra, that hiring policy was designed to thwart union affiliated applicants from being hired, and was alleged, and I find that it was unlawful.

Thus, as shown above, Respondent refused to consider the union affiliated applicants, and instead hired others. General Counsel's prima facie showing is supported by the fact that on February 7, Gambino informed union applicants that Respondent was not hiring, whereas a little more than 2 weeks later it hired two workers, and continued to hire thereafter. This false reason provides added basis for General Counsel's case.

I accordingly find that General Counsel has made a prima facie showing of discrimination pursuant to *Wright Line*.

H. Respondent's Defense

Respondent abandoned its policy of receiving applications for employment because of the substantial amount of manpower available, and the fact that applications become stale after a short period of time.

Nevertheless, Respondent resorted to advertising for journeymen in New York, and employed subcontractors who performed the same work as its employees could have performed in both the New York and Maryland locations. If employees were as readily available as Respondent claims, it would not have had to utilize either advertisements or subcontracted workers.

Rather, the evidence is clear that Respondent ended its policy of accepting applications for employment at a time when the Union was actively organizing, and seeking to have employees represented by it apply for work with the Company. Thus, Respondent concedes that it accepted applications in the past. Indeed, applications were filed until April 10, 1994, at Respondent's office.

General Counsel argues that Respondent changed its policy because of the issuance of the complaint against it in the prior case, 316 NLRB 625. That complaint was issued on February 8, 1994, based upon charges filed in November and December 1993. General Counsel contends that the policy was changed, because at that time, the Unions' attempts to organize it were

well known, and Respondent sought to avoid hiring union members.

Respondent asserts that it began its no-application policy in early 1994 because of an abundance of manpower, and because applications, when on file, become stale. It claims it substituted this method of obtaining applicants with a procedure whereby it first attempts to transfer employees, and then considers its own out-of-work employees, and then seeks positive referrals from other sources.

Those methods, if used exclusively, would support Respondent's defense. However, as noted, Respondent departed from this policy by seeking employees from other sources—advertisements, and employing subcontractors at a time when it was short of personnel, who performed work which could have been done by its own workers. I accordingly find that Respondent's refusal to accept written applications for employment was designed to prevent the receipt of applications from union applicants.

Further evidence of its unlawful hiring policy are the facts that it appears to be a closed system. If employees are unavailable from its other work sites or from those receiving unemployment insurance, Respondent seeks employees from referrals from its own workers, and others at the jobsite. An employee will be hired by this method, only if he is referred by someone who can attest to his work and character and give a "positive referral."

By virtue of this policy, the "effect of this system was to preclude union members from employment." *Eldeco*, supra at 870. It is unlikely that Respondent's current employees would recommend an active union adherent, and "the practical effect of [these] criteria was to preclude employment by union members." *D.S.E. Concrete Forms*, 303 NLRB 890, 897 (1991). Moreover, the "positive" referral is quite subjective. It could only be given by someone known as a person of trust to the individual doing the hiring. Such policy had as its effect, that union applicants would not be referred. Gambino at first conceded that Union Agent Graham's attempts to have union applicants hired constituted referrals, but then said that he must know the referring party.

Moreover, that policy was not honored at times in the hiring process. Thus, as set forth above, employees were hired at both locations where there was no evidence that they were former employees or that their hire was as a result of a positive referral, and at least one employee was hired through an advertisement which ran for 1 month.

In addition, Barrett was hired at the jobsite, after appearing there, first being told that no applications were being accepted, and then being hired after presenting a resume listing no union affiliations. Respondent attempts to justify Barrett's hire as a permissible "gate hire." *Dockendorf Electric*, 320 NLRB 4, 16 (1995). However, gate hiring was not a part of Respondent's hiring policy. Indeed, if it was, Respondent would have considered for hire the union applicants who appeared at the New York jobsite in late September, just prior to the hire of three other nonunion affiliated employees in the next 4 weeks.

Respondent argues that it possessed no union animus as illustrated by its treatment of David Harageones.

Following a hearing in which it was found that Harageones was not unlawfully laid off because of his union activities, as alleged, Respondent offered him employment, which he accepted. Respondent was under no obligation to offer reinstatement to Harageones, but nevertheless it did so at a time when it knew of his union affiliation. I agree that this is some evidence of a nondiscriminatory attitude on Respondent's part. However, Respondent's later treatment of Harageones, which I find to be an unfair labor practice, undermines Respondent's allegedly neutral hiring policy.

Respondent further argues that its hiring policy was nondiscriminatory because it hired employees with known union connections or affiliations. First, the fact that some employees with union affiliations were hired does not mean that Respondent did not discriminate against others. *J. S. Alberici Construction Co.*, 231 NLRB 1030, 1041 fn. 5 (1977).

As to those employees Respondent claims it hired who had union affiliations, there is a significant difference, in kind, in the types of their union involvement as compared to the union connection of those referred by the Union.

Thus, Boyes' work for a union company took place years before his employment with Respondent, and was before he left the industry. Wilson was employed most recently with a company, whose union affiliation was not identified, but his employment prior to his current job was with a union company, and his union training was 14 years prior to his employment by Respondent. Maines last worked for a union contractor 6 years before his hired by Respondent. Gambino's testimony that Burdette was affiliated with a union because a foreman of a union company recommended him is not persuasive. Similarly unpersuasive is the claim that Kenny Paul was affiliated with a union based only on Tyler's telling Gambino that Paul used to work for a union company. Hardesty had not been a union member for more than 20 years.

Likewise, Foster's only claimed union affiliation was that, at the time of his hire, he requested time off to work for contractors performing nuclear plant shutdowns. The contractors were known union companies. Nevertheless, the contractors were not named, and his application did not list any contractors at all. In addition, the hire of Manning was testified by Campbell, to the effect that he believed Manning said he had some training with a union affiliation, consisting of being in a union apprenticeship program for 2 months and then leaving because he was dissatisfied with the union.

In the above instances, the employees involved had union affiliations or connections to some degree, but their union involvement was weak, remote, and not current or active. *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991). Particularly when compared to the applicants presented by the Union, whether at the jobsite or in its offices, there is a significant difference between the union commitment of the employees hired by Respondent, and the vocal, active union referred applicants turned away at the door. *Fluor Daniel, Inc*., 311 NLRB 498, 500 (1993).

I accordingly find and conclude that Respondent has not met its burden of proving that it would have refused to consider the union applicants in the absence of their union affiliations. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Respondent Nelson Electrical Contracting Corp. d/b/a Nelcorp, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Locals 36, 325, and 363, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining in force and effect a hiring policy whereby Respondent will not accept written applications in order to avoid hiring union applicants for employment, Respondent has violated Section 8(a)(1) of the Act.

4. By refusing to consider for hire the following employees, Respondent violated Section 8(a)(1) and (3) of the Act:

Richard DiMaio	Harold Doderer
Daniel Harageones	Richard McGinley
Stephen Rockafellow	Anthony Salvatore
Tyrone Jackson	Thomas Gough
Thomas Barber	James Camba
Michael Lee	John Mudd
David Rohr	Joseph Ruiz
Steve Williams	Michael Ferranda
Anthony Provenzano	Herbert Spicer
Kelly Simmons	John Kirscht
James Rapczynski	Monte Brown

5. By failing to recall its employee David Harageones, Respondent violated Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

It having been found that the Respondent has committed certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom, and to take certain remedial actions intended to effectuate the policies of the Act.

The complaint alleges that Respondent refused to hire and/or refused to consider the applicants for hire. Under the facts as established here, where the applicants were denied employment for discriminatory reasons, employees had been hired to fill positions which were available, Respondent departed from its past method of obtaining employees by refusing to accept written applications, and hiring so as to avoid hiring the Union applicants, and the 22 applicants were all journeymen who were not shown to be unqualified for the positions to which they applied, and that none were actually hired, I find that a discriminatory refusal to hire in violation of Section 8(a)(1) and (3) has occurred. *Casey Electric*, 313 NLRB at 775; *Ultrasystems*, supra.

It having been found that Respondent unlawfully refused to employ the individuals listed above, it is recommended that Respondent be ordered to offer them employment and make them whole for any loss of earnings they may have suffered, as determined in compliance proceedings, in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and that the duration of the remedy be left to the compliance stage of the proceeding. *Casey Electric*, 313 NLRB 774, 775 (1994); *Eldeco, Inc*., 321 NLRB 857, 858 (1996); *Dean General Contractors*, 285 NLRB 573 (1988). It having been found that Respondent unlawfully refused to recall David Harageones to employment, it is recommended that Respondent recall him to employment, and make him whole, as set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [13]

ORDER

The Respondent, Nelson Electrical Contracting Corp., d/b/a Nelcorp, Endwell, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in force and effect a hiring policy whereby it will not accept written applications in order to avoid hiring union applicants for employment.

(b) Failing and refusing to recall David Harageones because of his activities in behalf of a labor organization

(c) Refusing to consider for employment, and refusing to employ the following employees for employment:

Richard DiMaio	Harold Doderer
Daniel Harageones	Richard McGinley
Stephen Rockafellow	Anthony Salvatore
Tyrone Jackson	Thomas Gough
Thomas Barber	James Camba
Michael Lee	John Mudd
David Rohr	Joseph Ruiz
Steve Williams	Michael Ferranda
Anthony Provenzano	Herbert Spicer
Kelly Simmons	John Kirscht
James Rapczynski	Monte Brown

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the individuals set forth above, employment in positions for which they applied, or attempted to apply or, or if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them, as forth in the remedy section of this decision.

(b) Recall David Harageones to his former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall David

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Harageones, and of the unlawful refusal to consider for employment and to employ the 22 discriminatees named above, and notify them in writing that this has been done and will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Endwell, New York copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 12, 1994.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."